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IN THE

Supreme Court of the United States

October Term, 1964

No. 794

ANDREW GEOLY and THOMAS GEOLY,
Petitioners,

against

HONORABLE CHARLES MARKS, Justice of the Supreme Court of the State of New York, County of New York,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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Statutes Involved

New York Penal Law, Section 2447

1. "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall

comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

* * *

2. "Competent authority" as used in this section means:

* * *

(c) "The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence."

New York Code of Criminal Procedure, Section 619

"Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt in the manner provided in the judiciary law."

New York Judiciary Law

§750. Power of courts to punish for criminal contempts

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts and no others:

* * *

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

§751. Punishment for criminal contempts

• • •

Such a contempt, committed in the immediate view and presence of the court may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense.

Statement of the Case

The petitioners, Andrew Geoly and Thomas Geoly, who are officers of several companies engaged in the manufacture and supply of costumes for stage, television and movie productions, were subpoenaed by the New York County Second July 1964 Grand Jury, which was investigating conspiracy and corrupt influencing of agents, employees and servants in the theatre industry in New York. They appeared on July 7, 1964, were sworn and gave their names and addresses. Although Andrew Geoly had previously told the district attorney that employees of various theatrical productions had requested and received gratuities from the corporations of which he and Thomas Geoly were officers, both petitioners refused to answer any further questions before the grand jury on the ground that the answers may tend to incriminate them.

At the request of the assistant district attorney presenting the evidence, the grand jury conferred immunity on both. The foreman of the grand jury explained to each that he would be immune from prosecution for any crime that may be the subject of the investigation, but would be subject to prosecution for contempt if his answers were evasive or if he refused to answer legal and proper questions of the grand jury and for perjury if he did not

answer truthfully. After consulting his counsel outside the grand jury room, each of the witnesses refused to answer questions, declaring that he declined the grant of immunity and that he refused to testify. Each of the witnesses also refused to be taken before a Justice of the Supreme Court to be admonished and advised (35, 39-40).*

Acting on behalf of the grand jury, and pursuant to a vote taken by them, the assistant district attorney made an application to a Justice of the Supreme Court to punish the witnesses for contempt. The contempt proceeding was instituted by orders to show cause why Andrew Geoly and Thomas Geoly, respectively, should not be adjudged "guilty of criminal contempt of court for his refusal to testify and to answer a legal and proper interrogatory before the Second July 1964 Grand Jury of the County of New York, and * * * punished as and for said criminal contempt pursuant to Section 619 of the Code of Criminal Procedure and Article 19 of the Judiciary Law, * * *" (32, 37). The order to show cause was dated July 9, 1964, and was returnable July 13, 1964. In an affidavit in support of the application, the assistant district attorney recited the facts related above, and also stated that on May 18, 1964, prior to his appearance before the grand jury, Andrew Geoly told him that he and his brother Thomas Geoly were officers of the Eaves Costume Manufacturing Company, Eaves Costume Enterprises, and Eaves Costume Company, which respectively manufacture costumes for stage productions, supply costumes for motion picture and television

* References, unless otherwise indicated, are to the pages of the petitioners' notice of petition to the Appellate Division of the New York Supreme Court, First Department, which contains a reprint of the various proceedings, orders, and affidavits, and constitutes the record below.

productions, and rent costumes for theatrical productions. At that time, Andrew Geoly told him that employees and agents of various theatrical productions, whose names he did not want to reveal, had requested and received gratuities from the corporations of which he and his brother, Thomas Geoly, were officers (34, 39).

On the return date of the order to show cause, which was adjourned to July 14, 1964, neither of the witnesses appeared in court, their counsel "specially appearing" to contest the jurisdiction of the court to punish them for contempt by any means other than indictment pursuant to subdivision 8 of Section 600 of the New York Penal Law (60-1). The court reserved judgment, giving defense counsel a week to submit legal memoranda (69). In an opinion dated July 23, 1964, the court overruled defense counsel's objections and directed Andrew Geoly and Thomas Geoly to appear in court on July 28, 1964 (70-1). On that date, after hearing argument by counsel, the court ordered Andrew Geoly and Thomas Geoly to appear before the grand jury on July 29, 1964 (82-3).

On July 29th the assistant district attorney, the foreman of the grand jury, a stenographer who had recorded the proceeding, and Andrew Geoly and Thomas Geoly and their counsel appeared in court. The stenographer took the witness stand and read the minutes of the grand jury proceeding of that morning, which indicated the following: Andrew Geoly was sworn, and gave his name and address. He was then asked his business or occupation, which he refused to give on the ground that the answer might incriminate him. The assistant district

attorney explained that the purpose of the investigation was to determine whether or not persons had received gifts or gratuities in the nature of commercial bribes in the theatrical industry or in connection with theatrical productions and that Mr. Geoly would not be considered a defendant. When the witness persisted in his refusal, the assistant district attorney recommended that the grand jury confer immunity on him, and he together with the witness retired from the jury room. On their return, the foreman informed the witness that they had conferred immunity on him. Mr. Geoly was advised that he would be immune from prosecution for any matter regarding which he gave evidence, but would be subject to prosecution for contempt if he gave evasive answers or refused to answer proper questions and to prosecution for perjury if he gave false answers. He was again directed, at the request of the district attorney, to answer the question. He still refused to do so, however, and asked to confer with his attorney. After he conferred with his attorney, he again refused to answer questions and read a statement setting forth his reasons for so doing (87-92). The foreman of the grand jury stated that he similarly informed Thomas Geoly that the grand jury had decided to grant him immunity and directed him to answer questions. He said that both Andrew Geoly and Thomas Geoly were asked the same questions and they both refused to answer (93).

After hearing the transcript read and hearing the foreman of the grand jury, the court directed Andrew Geoly and Thomas Geoly to answer in court, the question, "What is the nature of your employment or business?" Each re-

fused to do so on the ground that the answer might incriminate him (94-5). The court stated,

> "Under the circumstances the court holds both the witness Andrew Geoly and Thomas Geoly in criminal contempt of this court summarily because of the contempt taken place before this court in the refusal to follow the direction of this court;" (95).

ARGUMENT

The petition does not present a substantial federal question.

The petitioners contended below and apparently contend in this Court that both the statute under which they were granted immunity and the contempt proceeding violated various New York statutory and constitutional provisions as well as federal due process. Specifically, the petitioners contended in their brief below, which they seek to incorporate by reference into their present petition for certiorari (a) that Section 619 of the New York Code of Criminal Procedure and Sections 750 and 751 of the Judiciary Law, pursuant to which they were held in contempt, do not apply to refusals to testify before the grand jury; (b) that the court lacked authority to bring petitioners before it by an order to show cause; (c) and that Section 2447 of the New York Penal Law, under which they received immunity, violates the requirement of separation of powers and is unconstitutional in that it does not protect the witness against degradation and infamy. They also argue that in view of this Court's decision that state grants of immunity bar federal use of the evidence so

obtained, the validity of a state grant of immunity under state law is subject to federal scrutiny, the rationale being that if the state fails to meet federal standards, federal agencies will not recognize the immunity and witnesses will have been compelled to incriminate themselves under federal law.

a. Section 619 of the Code of Criminal Procedure and Sections 750 and 751 of the Judiciary Law

The petitioners' contention that Sections 619 of the Code of Criminal Procedure and 750 and 751 of the Judiciary Law do not apply to refusals to answer questions before the grand jury does not present any federal question. Insofar as New York law is concerned, the Appellate Division's rejection of the petitioners' contention that the statutes do not apply and the Court of Appeals' denial of leave to appeal, is, of course, dispositive. Moreover, the petitioners' contention is contrary to the clear language of the statutes and to New York decisions spanning a century. See *e.g. Second Additional Grand Jury* v. *Cirillo*, 12 N. Y. 2d 206 (1963); *People* v. *Hackley*, 24 N. Y. 74 (1861). Refusals to answer proper and lawful questions of the grand jury have also been held to be contempt of court by federal courts and state courts in other jurisdictions. See *e.g. United States* v. *Harris*, 334 F. 2d 460 (2d Cir. 1964); *Enrichi* v. *United States*, 212 F. 2d 702 (10th Cir. 1954); *State* v. *Rodriguez*, 52 So. 2d 756 (La. 1951); *Burnham* v. *Gendron*, 82 A. 2d 773 (Me. 1951).

b. The Order to Show Cause

An order to show cause is the appropriate means of instituting a contempt proceeding and giving the notice required by Section 751 of the New York Judiciary Law for contempts committed out of the immediate view and presence of the court. Such a practice has long been approved by New York and other courts, including this Court. See *e.g. Brown* v. *Walker,* 161 U. S. 591, 593 (1896); *Second Additional Grand Jury* v. *Cirillo,* 16 App. Div. 2d 605 (2nd Dept.), aff'd 12 N. Y. 2d 206 (1963); *Enrichi* v. *United States, supra,* 212 F. 2d 702; see also *Ungar* v. *Sarafite,* 16 App. Div. 2d 617 (1st Dept. 1962), aff'd 12 N. Y. 2d 1013 (1963), aff'd 376 U. S. 575 (1964).

Even though the proceeding was initiated to punish for a contempt that was committed in the grand jury room, out of the presence of the court, when the petitioners repeated their refusal to answer, in open court, they were subject to punishment summarily for a contempt "committed in the immediate view and presence of the court." Judiciary Law, §751; *People ex rel. Cirillo* v. *Warden,* 11 N. Y. 2d 51, 53 (1962); *People* v. *Hackley, supra,* 24 N. Y. 74, 79-80; *People* v. *Knapp,* 157 N. Y. S. 2d 820 (1st Dept. 1956), aff'd *sub nom. Knapp* v. *Schweitzer,* 2 App. Div. 2d 579, aff'd 357 U. S. 371, rehearing denied, 358 U. S. 860; *United States* v. *Harris, supra,* 334 F. 2d 460, 463; *Enrichi* v. *United States, supra,* 212 F. 2d 702.

In the instant case the petitioners were accorded all the rights that pertain to a plenary hearing. They were given written notice, time to prepare, and were repre-

sented by counsel. Thus, all the requirements for a non-summary proceeding were complied with. When, however, they were directed by the court to answer the question, and refused to do so in the court's presence, they committed contempt in the immediate view and presence of the court and could be adjudged in contempt summarily. *People* v. *Hackley, supra,* 24 N. Y. 74, 80; *United States* v. *Harris, supra,* 334 F. 2d 460, 463; *Enrichi* v. *U. S., supra,* 212 F. 2d 702. Since the petitioners repeated their refusal in court and were punished for that contempt, the failure to set forth the proceeding before the grand jury *verbatim* in the order to show cause was irrelevant. It should be noted, however, that petitioners could not have been in any doubt as to the question at which the order to show cause was directed, since they refused to answer immediately after giving their name and were asked no other questions.

c. Section 2447 of the Penal Law

The petitioners' contention that Section 2447 of the Penal Law constitutes an unconstitutional delegation of power by the legislature is equally without substance. The immunity provision was held "unquestionably constitutional and valid" by the New York Court of Appeals [*People* v. *Steuding,* 6 N. Y. 2d 214, 217 (1959); see also, *People* v. *DeFeo,* 308 N. Y. 595, 604 (1955)]. An almost identical federal immunity provision was sustained by this Court in *Ullman* v. *United States,* 350 U. S. 421 (1956).

In *Ullman,* this Court also rejected the contention that the immunity statute is invalid because it does not protect

the witness against non-criminal sanctions to which his incriminating testimony may expose him, stating:

> "* * * as this court has often held, the immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege. 'The interdiction of the Fifth Amendment operating only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply' *Hale* v. *Henkel*, 201 U. S. 43, 67." *Ullman* v. *U. S.*, *supra*, 350 U. S. at 431.

d. The *Malloy* and *Murphy* Decisions

In *Malloy* v. *Hogan*, 84 S. Ct. 1484 (1964), this Court held that the Fifth Amendment privilege against self-incrimination applies to the states. In *Murphy* v. *Waterfront Commission*, 84 S. Ct. 1589 (1964), the Court held that the Federal Government is prohibited from using any evidence or the fruits of evidence compelled by the states, unless it has obtained such evidence from an independent source. Since the New York privilege against self-incrimination (N. Y. Const., Art. 1, §6) is identical to the federal privilege, the application of the federal privilege does not require New York to accord witnesses any greater protection than they received hitherto.

The hypotheticals suggested by the petitioners, such as states authorizing indiscriminate grants of immunity, or petty officials granting immunity without statutory authorization, raises the interesting problem of whether, now that the Federal Government is affected by a state grant of

immunity, it may also prescribe conditions for its conferral. Theoretically this would seem unnecessary, since the Federal Government is not barred from establishing the matter, but merely from using the induced evidence or fruits of such evidence. *Murphy* v. *Waterfront Commission, supra,* note 18. To paraphrase Justice Goldberg, this "leaves the witness and the Federal Government in substantially the same position as if the witness" had not testified.

Without considering the soundness of the District Court's decision in *United States* v. *Interborough Delicatessen Dealers Assn.* (S. D. N. Y. 1964), it clearly does not apply to the instant case because that case turns on the fact that the witnesses never invoked the Fifth Amendment privilege against self-incrimination and immunity was never conferred on them; two of the witnesses had acquired immunity automatically under New York law because they were subpoenaed even though they were the target of the investigation and the third witness appeared voluntarily in response to a letter. The District Court held that since there had been "no refusal to answer questions and no explicit claim of privilege",* the witnesses' testimony was not "compelled" within the meaning of the Fifth Amendment. In the instant case, the witnesses claimed the privilege and immunity was specifically conferred. Thus, the problem with which the *Interborough Delicatessen Dealers* case was concerned does not arise. While this case holds, as petitioners contend, that the existence of immunity from federal prosecution must be determined by federal standards, it does not further their

* The District Court's opinion is reprinted as Appendix J, at pages 44a-50a, of the petition for certiorari. The quoted language appears on page 49a.

argument that the immunity conferred on them is invalid because they have not shown that the immunity statute and the procedure pursuant to which they were adjudicated in contempt fails to satisfy federal requirements.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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